

1 Abran E. Vigil
2 Nevada Bar No. 7548
3 Christina Royce
4 Nevada Bar No. 12274
5 **BALLARD SPAHR LLP**
6 100 North City Parkway, Suite 1750
7 Las Vegas, NV 89106-4617
8 Telephone: 702-471-7000
9 Facsimile: 702-471-7070
10 E-mail: vigila@ballardspahr.com
11 E-mail: roycec@ballardspahr.com

12 *Attorneys for Defendant*
13 *SunTrust Mortgage*

14 **UNITED STATES DISTRICT COURT**

15 **DISTRICT OF NEVADA**

16 LACY DALTON, *et al.*,

17 CASE NO. 3:09-cv-00534-LDG-VPC

18 Plaintiffs,

19 **SUNTRUST MORTGAGE'S RENEWED**
20 **MOTION TO EXPUNGE PLAINTIFF**
21 **CHRISTOPHER BALLENGEE'S LIS**
22 **PENDENS, OR ALTERNATIVELY**
23 **MOTION TO RECONSIDER**

24 vs.

25 CITIMORTGAGE INC., *et al.*,

26 Defendants.

27
28 Defendant SunTrust Mortgage ("SunTrust") files this renewed motion to expunge
the notice of lis pendens filed by Christopher Ballengee ("Plaintiff") following the dismissal
of all pending claims in the *In re Mortgage Electronic Registration Systems (MERS)*
Litigation, No. 09-2119(JAT) (the "MDL litigation") by Judge Teilborg in the United States
District Court of Arizona (the "MDL Court"). Alternatively, SunTrust brings this motion to
reconsider this Court's Order [#428] denying SunTrust's original Motion to Expunge Lis
Pendens [#414]. This motion is based on the pleadings and papers on file herein, the
following memorandum of points and authorities, and any oral argument the Court may
entertain on the matter.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Ballengee filed this action on September 14, 2009 with a group of other
 4 plaintiffs as part of a putative class action in the United States District Court of Nevada.
 5 The multi-district litigation panel transferred all claims relating to the formation and
 6 operation of MERS to the MDL Court on June 3, 2010 [#60]. In its March 21, 2011 Order,
 7 the MDL Court explained that it would not retain claims that related to origination and
 8 collection practices, or otherwise strayed from the common factual core of the MDL, even
 9 if MERS was named as a defendant. *See* MDL Order [#79] at 3.

10 Plaintiff Ballengee stipulated to dismissal of his claims against SunTrust on
 11 December 20, 2010. *See* Stipulation of Dismissal and Order to Dismiss Defendants
 12 Midland Mortgage Company and SunTrust Mortgage with Prejudice Pursuant to Fed. R.
 13 Civ. P. 41(a)(1)(A)(ii) [#399]. This Court then dismissed SunTrust with prejudice on
 14 December 22, 2010. *See* Order [#401]. Despite SunTrust's dismissal, on February 2,
 15 2011, Plaintiff recorded a lis pendens (the "Lis Pendens") on the property located at 7013
 16 Voyage Drive, Sparks, Nevada 89436 (the "Property"). SunTrust brought a motion to
 17 expunge the Lis Pendens on April 1, 2011 [#414]. Plaintiff opposed the motion, arguing
 18 that it was premature because of the ongoing MDL litigation. *See* Response to Motion to
 19 Expunge Lis Pendens [#420]. The Court denied SunTrust's motion, stating that the "MDL
 20 court retains jurisdiction over Christopher Ballengee's remaining claims, and the propriety
 21 of the lis pendens must be analyzed in the context of any remaining claims." *See* Order
 22 [#428].

23 The putative class action plaintiffs filed their Consolidated Amended Complaint
 24 ("CAC") [#1424] in the MDL litigation on June 4, 2011. Neither the CAC, nor any
 25 pleadings since have articulated any claims against SunTrust. On October 3, 2011, the
 26 MDL Court dismissed the putative class action plaintiffs' CAC with prejudice. *See* Order
 27 [#1602] ("MDL Dismissal Order"). As Plaintiff Ballengee had no basis for filing the Lis
 28 Pendens, and his claims against SunTrust and all of the putative class action plaintiffs'

1 claims in the MDL litigation have both been dismissed with prejudice, SunTrust renews its
2 request that this Court expunge the Lis Pendens based on the claims pending before it.
3 Alternatively, SunTrust requests that the Court reconsider its Order denying SunTrust's
4 Motion to Expunge because allowing a Lis Pendens on the Property to continue following
5 the dismissal of all claims in the MDL litigation creates an inequitable and injurious result
6 to SunTrust.

7 **II. LEGAL ARGUMENT**

8 **A. Standard of Review**

9 Pursuant to Nevada statute, Plaintiff has the burden of demonstrating that the Lis
10 Pendens is proper. See N.R.S. §14.015(2). A lis pendens is appropriate only where the
11 action affects title or possession of real property. See N.R.S. §14.010(1). Once a
12 claimant records a notice of lis pendens, the opposing party may move to expunge the lis
13 pendens pursuant to Nev. Rev. Stat. §14.015. To justify the filing of a lis pendens, a
14 claimant must meet the requirements set forth in Nev. Rev. Stat. §14.015(2), namely that
15 (a) the action affect the title or possession of the property; (b) the action was not brought
16 in bad faith or for an improper motive; (c) claimant will be able to perform any conditions
17 precedent to the relief sought in the action regarding the title or possession of the
18 property; and (d) claimant can establish that it would be injured by the transfer of any
19 interest in the property before the action is concluded. In addition to these elements, a
20 claimant must also establish the likelihood of success on the merits or a fair chance of
21 success, such that the hardship on the party recording the lis pendens is greater than the
22 hardship on the property owner. See N.R.S. §14.015(3). "If the court finds that the party
23 who recorded the [lis pendens] has failed to [meet the required standards], the court shall
24 order the cancellation of the lis pendens." N.R.S. §14.015(5).

25 On a motion for reconsideration, a party may seek relief from a judgment or order
26 based on (1) a mistake; (2) newly discovered evidence; (3) fraud; (4) if the judgment is
27 void; (5) if the judgment has been satisfied, discharged, reversed, vacated, or if applying
28 it is no longer equitable; (6) or any other reason justifying relief. See Fed. R. Civ. P.

1 60(b). Courts have recognized a motion to reconsider under Rule 60 as codifying the
 2 long-established principle of equity practice, that a court has discretion to recognize
 3 changed circumstances. See *Gilmore v. California*, 220 F.3d 987 (9th Cir. 2000).

4 **B. SunTrust's Motion to Expunge Should Be Granted Based on the
 5 Issues Before This Court**

6 **1. Plaintiff Cannot Meet Its Burden Under N.R.S. §14.015(2)**

7 Plaintiff is unable to satisfy the statutory requirements under Nev. Rev. Stat.
 8 §14.015(2) and therefore cannot establish any legal basis for recording the Lis Pendens.
 9 Under the Nevada statute, claimants are prohibited from having a bad or improper motive
 10 for recording a lis pendens. See N.R.S. §14.015(2)(b). Plaintiff's motive here, at best, is
 11 questionable. Plaintiff has already dismissed SunTrust from the pending litigation with
 12 prejudice. Moreover, Plaintiff never added any claims as to SunTrust in the MDL
 13 litigation. Plaintiff's filing of the Lis Pendens impedes SunTrust's contractual and
 14 statutory rights to the property, in a hope of maintaining property for which Plaintiff has no
 15 rights. See N.R.S. §14.015(2)

16 In addition, a claimant must be able to perform any conditions precedent to the
 17 relief sought as well as establish that it would be injured by a transfer of interest in the
 18 property before the action is concluded. See N.R.S. §14.015(2)(c)-(d). Plaintiff
 19 Ballengee cannot perform any conditions precedent to the relief sought since he has
 20 already defaulted on his loan agreement and no longer owns the Property. Moreover,
 21 Plaintiff cannot establish that he would be damaged by a transfer of interest in the
 22 Property at issue. The dismissal of all claims in the MDL litigation resulted in the
 23 conclusion that the action and Plaintiff was not successful on his claims. As such,
 24 Plaintiff does not meet the necessary requirements under Nev. Rev. Stat. § 14.015(2)
 25 and therefore cannot meet his burden for maintaining a Lis Pendens on the Property.

1 **2. Plaintiff Cannot Establish a Likelihood of Success on the Merits
2 or Fair Success Under the Balancing Requirements Under
2 §14.015(3)**

3 Plaintiff's inability to satisfy the statutory requirements under Nev. Rev. Stat.
4 §14.015(3) of establishing a likelihood of success on the merits or a fair success under
5 the balancing requirements further necessitates removal of the Lis Pendens. In addition
6 to meeting the requirements under Nev. Rev. Stat. §14.015(2) detailed above, a claimant
7 must also show either that it (a) has a likelihood of success on the merits or (b) has a fair
8 chance of success, such that the hardship on the party recording the lis pendens is
9 greater than the hardship on the opposing party under Nev. Rev. Stat. §14.015(3).
10 Plaintiff Ballengee has ***no*** probability of success on the merits because SunTrust
11 discharged all of its duties under the foreclosure statute and has been dismissed from the
12 litigation with prejudice, pursuant to Plaintiff's own stipulation. Any other claims or legal
13 theories Plaintiff may have attempted to pursue in the MDL litigation have now also been
14 dismissed with prejudice.

15 Moreover, a balancing of hardships falls in favor of expunging the Lis Pendens.
16 SunTrust has suffered a severe hardship for over eight months because of Plaintiff's Lis
17 Pendens, which effectively precludes a sale of the Property. During that time, Plaintiff
18 has not brought any additional claims against SunTrust and all of its claims in the MDL
19 litigation have now been dismissed. In contrast, expunging the Lis Pendens will cause no
20 harm to Plaintiff because Plaintiff no longer has an interest in the Property and any claims
21 to the contrary have now been dismissed with prejudice. Plaintiff cannot establish either
22 a likelihood of success on the merits or that a balancing of hardships falls in his favor.
23 Accordingly, Plaintiff cannot meet his statutory burden and the Court should therefore
24 expunge the Lis Pendens.

25 **C. Alternatively, Reconsideration of the Court's Order Denying
26 SunTrust's Motion to Expunge is Proper in Light of the Recent
26 Dismissal of Claims in the MDL Litigation**

27 SunTrust's motion to reconsider should be granted based upon the changed
28 circumstances and inequitable result of Plaintiff maintaining the Lis Pendens on the

1 Property following the MDL Dismissal Order. Under Rule 60 of the Federal Rules of Civil
 2 Procedure, relief from a court's order is proper if its application is no longer equitable or
 3 for any other reason that justifies relief. See F.R.C.P. 60(b)(5)-(6). The Court's Order
 4 denying SunTrust's motion to expunge was based on the MDL Court's jurisdiction of
 5 Plaintiff Ballengee's remaining claims. See Order [#428]. The MDL Court has now
 6 ordered a complete dismissal of all of the putative class claims. See MDL Dismissal
 7 Order at 20. Thus, Plaintiff Ballengee no longer has any existing claims in the MDL
 8 action. Given that Plaintiff Ballengee's claims have now been dismissed both as to
 9 SunTrust and as part of the MDL litigation with prejudice, allowing the Lis Pendens to
 10 continue on the Property will cause further injury and an inequitable result to SunTrust.
 11 Accordingly, SunTrust asks the Court to reconsider its Order dismissing SunTrust's
 12 motion to expunge because there are no remaining claims in the MDL action to consider,
 13 and to expunge the lis pendens based on the claims pending before this Court.

14 **III. CONCLUSION**

15 Because Plaintiff is unable to demonstrate the validity of the Lis Pendens as
 16 required by statute, and because all of Plaintiff's claims in the MDL litigation and against
 17 SunTrust have been dismissed, SunTrust respectfully requests that this Court expunge
 18 the Lis Pendens either on the basis of SunTrust's Renewed Motion to Expunge the Lis
 19 Pendens or alternatively as a Motion to Reconsider.

20 DATED this ___ day of October, 2011.

21 BALLARD SPAHR LLP

22
 23 ORDER

24 IT IS SO ORDERED the above Motion
 25 to Expunge Lis Pendens is granted.

26 DATED this 29 day of November, 2011.

27 By:/s/

28 Abran E. Vigil
 Nevada Bar No. 7548
 Christina Royce,
 Nevada Bar No. 12274
 100 North City Parkway, Suite 1750
 Las Vegas, Nevada 89106-4617

Attorneys for Defendant
 SunTrust Mortgage

Lloyd D. George
 Sr. U.S. District Judge